Supreme Court, U.S.
FILED
JUN 6 2000
CLERK

(4)

No. 99-1733

IN THE
Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,

Petitioner,

v.

ASUNCION MORENO,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

JEFFREY S. SUTTON
Counsel of Record
CHAD A. READLER
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioner

11pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page**

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 4, 6

Carnival Cruise Lines, Inc. v. Shute,
498 U.S. 807 (1990) 1, 6

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991) 1, 6

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 1, 5, 6

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 5

Nowak v. Tak How Invs., Ltd.,
94 F.3d 708 (1st Cir. 1996) *2*

REPLY BRIEF FOR PETITIONER

In its petition, Shoppers Food Warehouse MD Corp. ("Shoppers") showed that this case presents an unanswered federal question, which is recurring in nature and which has deeply divided the lower courts. It showed that the Court has previously identified the issue, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), and once before granted review of the question but ultimately did not reach it, *compare Carnival Cruise Lines, Inc. v. Shute*, 498 U.S. 807, 807-08 (1990), *with* 499 U.S. 585, 589 (1991). And it showed that this mature division in lower-court authority raises a matter of great importance to the workings of lower courts, addresses the ever-consequential power of one State to import a cause of action that rightfully belongs to another, and concerns an issue of enduring significance to corporate and individual litigants alike. Since the filing of the petition, the Chamber of Commerce of the United States and the Food Marketing Institute have filed a brief *amici curiae* that supports each of these points and more. Among other reasons for granting the writ, the *amici* contend that "[t]he costs and uncertainties engendered by the current confused state of the law" should be and can only be resolved by the Court. (U.S. Chamber 10.)

Respondent understandably takes a different tack. But none of her contrary arguments develops traction and many of them ultimately confirm the wisdom of reviewing the case. For these reasons, those spelled out in the petition, and those elaborated below, we respectfully submit that the issue warrants the Court's immediate attention.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no independent and adequate state ground (as there could not be in this setting) precluding review. Nor does respondent argue that the case contains any other factual or procedural impediments that would create vehicle problems

for addressing the question presented. Respondent's main point, it turns out, is that the *en banc* decision was correct, a position that deserves the Court's full attention and consideration but not, we submit, until review has been granted.

2. Moving from the general to the specific, respondent argues (Resp. 3) that the petition "wrongly asserts that Ms. Moreno never claimed to see the advertisements before going to Shoppers Food Warehouse." How she can say so, though, remains unclear. No record or lower-court citation is offered to support the point. And the argument runs head long into the contrary view of the *en banc* court, which unequivocally found the following: "It is important to note that Ms. Moreno never claimed to have seen the Thanksgiving ad." (Pet. App. 18a n.10.) Nor does the lower-court record back her up. In responding to Shoppers' motion to dismiss for lack of personal jurisdiction at the trial level, no such evidence was ever admitted or even offered. Respondent simply argued that the grocery store solicits customers in the District through *The Washington Post*, metropolitan television networks and the Yellow Pages. She did not attempt to present any evidence establishing a cause-and-effect relationship between her November 20, 1993 visit to the Shoppers store and this advertising.

More fundamentally, this argument misses one of the essential points of the petition and misapprehends one of the lower-court debates that the petition seeks to resolve. As with the non-resident defendant in *Carnival Cruise Lines*, Shoppers contends among other things that a proximate, not a but-for, causal relationship must exist between the cause of action and the defendant's forum contacts before personal jurisdiction will exist. To prevail, Shoppers thus need only show that advertising in the District was not a "material[] element of proof in the plaintiff's" tort action, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (quotation omitted),

which of course it was not in view of the standard elements of a negligence cause of action. In this respect, Shopper's argument, and the resolution of this debate in the lower courts, need not necessarily turn on causation at all. It would turn on whether but-for causation by itself suffices. Accordingly, respondent's factual contention not only is utterly unsupported by the record, but at best just points to another line of division in the lower courts that Shoppers seeks to resolve here.

3. Respondent next accuses Shoppers (Resp. 1-3, 10-11) of belittling the types of media in which the grocery store's advertisements run and the frequency with which they are carried. Properly framed, respondent argues (Resp. 1), the question is not whether jurisdiction exists where the "*only* forum contacts consist of advertising in a metropolitan newspaper," but whether jurisdiction exists when the defendant deploys several types of advertising in the forum State. (Quoting Pet. at 3 (respondent's emphasis)). This argument, too, is wrong and self-defeating. The opening page of the petition leaves no mystery about the question presented: "May a long-arm statute constitutionally reach a nonresident defendant when the defendant's only activities in the forum consist of advertising and when the out-of-state accident did not arise from that advertising?" The petition, in other words, is framed just as respondent wishes: It covers all types of advertising, not just metropolitan newspapers. More than that, however, respondent's emphasis on Shoppers' other advertising media only makes the case more like *Carnival Cruise Lines*, more akin to the other cases that have struggled with this issue and an even better vehicle for addressing this question, because virtually all of these lower court cases involve more than one type of forum advertising. In the end, the issue is whether advertising (no matter the medium) may ever suffice by itself to establish personal jurisdiction over a cause of action that does not arise from those contacts. Respondent's argument serves merely to emphasize the point.

4. Also unavailing is respondent's fainthearted claim (Resp. Br. 14) that "there is no division of authority" in the lower courts over this issue. At no point does respondent support this argument with any discussion of, or even citation to, petitioner's extensive references to lower-court cases and scholarly commentary on this point. She does not disagree that three distinct schools of legal thought have emerged on the issue. She does not dispute that significant judicial resources are being devoted to wrestling with the uncertainty surrounding the question. And she does not dispute that the *en banc* decision itself recognized this depth of division. Add to this the admissions contained in respondent's own brief, and it becomes difficult to escape the reality of this lower-court conflict. In respondent's words: (1) "it is true (as discussed more fully below) that different jurisdictions have handled the nexus requirement differently" (Resp. 8-9); (2) "simply because lower courts apply different tests does not mean there is a division of authority" (Resp. 10); (3) "different jurisdictions may develop different law on this issue of the nexus requirement" (Resp. 9); (4) "[j]ust because different courts at the state and federal level develop different common law on an issue does not mean there is a split of authority" (Resp. 11); and (5) "[t]here is no split of authority simply because different jurisdictions have adopted different tests" (Resp. 12). If words are to have any meaning, it must be true that when "lower courts apply different tests," "there is a division of authority" over the right legal "test[]." By any standard for assessing the "conflict" requirements of Rule 10, respondent's own characterization of the lower-court record should suffice to establish the existence of this mature and recurring conflict.

5. No more helpful is respondent's invocation (Resp. 13) of the Court's statements that there are no "mechanical tests" or "talismanic formulas" for determining personal jurisdiction. (Quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). This fatalistic contention deals not with the "arising out of or relating to" inquiry or even with the distinction

between personal and general jurisdiction, but rather with the fairness inquiry that comes at the end of every personal-jurisdiction analysis. It has no relevance to the "arising out of" inquiry, which *Burger King* did not address and which the Court as shown has already identified as worthy of separate and independent consideration.

6. Respondent nowhere responds to the petition's claim (Pet. 21), now bolstered by the Chamber's *amici* brief (U.S. Chamber 13-15), that the specific-jurisdiction test embraced below collapses and ultimately threatens to eliminate the Court's distinction between general and specific jurisdiction. That problem by itself ought to warrant immediate review. Far from addressing this concern, moreover, respondent ultimately exacerbates it through her frequent invocations of the Court's classic general-jurisdiction language ("systematic and continuous" advertising contacts (*e.g.*, Resp. 10)). Most advertising, and certainly most good advertising, frequently will be "systematic and continuous." Though not claiming that general jurisdiction exists in this case and though not cross-petitioning on the point, respondent's references suggest still another test in this area. The theory seems to be that specific jurisdiction turns not on a proximate, a but-for or even a discernible relationship test but on the amount of advertising in a given case. Besides risking a complete collapse between the general- and specific-jurisdiction inquiries, this approach offers just one more school of thought in this area and in the end one more reason for granting the writ.

7. Respondent's other merits arguments (Resp. 12-13) also do not advance her cause. Instead of resolving the issue here, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), all focus on when a party has "purposefully directed" its activities at residents of a forum. They do not determine when a claim "arises out of or relates to" a

defendant's forum contacts, least of all when the only forum contact is advertising. *Keeton*, for example, properly assumed that a libel action arises out of forum contacts when the defendant sent the allegedly libelous magazines into the forum State for sale. 465 U.S. at 780. That, however, just proves that Shoppers may be compelled to defend a false-advertising claim in the District, not that it may be forced to defend a tort action there. *Helicopteros* involved a situation in which "[a]ll parties to the present case concede that respondent's claims against [petitioner] did not 'arise out of,' and are not related to, [petitioner's] activities within Texas." 466 U.S. at 415. After making this observation, the majority noted the unresolved legal issue regarding the interpretation of this requirement, *id.* at 415-16 & n.10, and Justice Brennan in dissent proceeded to analyze how it should be resolved, *id.* at 424-28. Under these circumstances, it remains unclear how respondent can tenably maintain (Resp. 12) that *Helicopteros* has already resolved this issue. Lastly, *Burger King* provides a lengthy analysis of the "fair play and substantial justice" prong of specific jurisdiction, but offers no analytical guidance regarding the "arising out of or related to" prong. 471 U.S. at 476.

8. Respondent's statements (Resp. 13 n.1) regarding *Carnival Cruise Line* are equally elusive. After conceding (*id.*) that *Carnival Cruise Line* presented "the same issue currently before the Court," respondent argues that the Court did not grant review of the issue. Respondent should know better. The Court, in fact, did grant review of this question, 498 U.S. at 807-08, received extensive briefing on the question and entertained oral argument on it. While the Court found "the forum selection clause to be dispositive of [the jurisdictional] question" and thus did not "consider [the] constitutional argument as to personal jurisdiction," 499 U.S. at 589, that by no means shows the Court refused to grant review. And, as we have contended, if the issue warranted review then, it warrants review now, and that is all the more true in view of the

burgeoning lower-court conflict that has arisen in the interim and that shows no sign of disappearing soon.

9. The Chamber's *amici* brief, like its brief in *Carnival Cruise*, bolsters each of these points. First, the Chamber confirms the wide applicability of this recurring issue. "All businesses that advertise in nationally distributed periodicals," the brief observes (U.S. Chamber 8), "are exposed to the same jurisdictional risk as petitioner"—a risk that has expanded dramatically in view of the proliferation of internet commerce and internet advertising. Second, repeating the conclusions of a survey it conducted at the time *Carnival Cruise*, the Chamber notes (*id.* at 9) that the "uncertainty about the States that can exercise jurisdiction over a company may induce the company to curtail its operations out of fear over being sued in distant States, to the detriment of consumers and an efficient market." Third, it observes that small businesses often face the brunt of the burdens imposed by the law's uncertainty. Such companies, it notes (*id.*), "have no rational basis on which to gauge the jurisdictional risk they face in suits in foreign States and therefore must safeguard against all such risks." Fourth, it contends (*id.* at 10) that this division of authority has generated the kinds of "costs and uncertainties" that it is uniquely the role of the Court to resolve. Whether one considers the arguments raised in the petition, the views of the *amici curiae*, the decision of the *en banc* court below, the views of the various Federal and State courts that have struggled with the issue, or the legal commentators, all agree that this important federal question cries out for review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
CHAD A. READLER
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioner

June 2000